

WORLDCOM

ORIGINAL
ORIGINAL

EX PARTE OR LATE FILED

Lisa B. Smith
Senior Policy Counsel/Director

1133 Nineteenth Street, NW
Washington, DC 20036
202 887 2992
Fax 202 736 6359

RECEIVED

May 14, 2001

MAY 14 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

David Solomon
Chief, Enforcement Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Qwest Communications International Inc. – Report of Independent Public Accountants,
Statement of Management Assertions, and Executive Certification of Compliance,
CC Docket No. 99-272.

Dear Ms. Attwood and Mr. Solomon:

I am writing on behalf of WorldCom, Inc. (“WorldCom”) to request that the Federal Communications Commission (the “Commission”) impose sanctions on Qwest Communications International Inc. (“Qwest”) for failing to comply with both of the Qwest/U S WEST Merger Orders¹ and section 271 of the Communications Act of 1934, as amended (“Act”).²

The Commission should impose appropriate sanctions for any violations apparent from the audit reports to deter future violations. The Commission should also initiate a full investigation to ascertain whether there are further instances of noncompliance with the Merger Orders and the underlying requirements of the Act.

¹ *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order in CC Docket No. 99-272 (rel. March 10, 2000) (“*March Merger Order*”); *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order in CC Docket No. 99-272 (rel. June 26, 2000) (“*June Merger Order*”).

² 47 U.S.C. § 271.

No. of Copies rec'd 012
LIST A B C D E

The *March Merger Order* held that the Merger would serve the public interest if it could withstand the rigors of section 271 of the Act,³ which prohibits BOCs and their affiliates from providing interLATA services originating in the BOC's operating region (unless the entity has received Commission approval). Concern over compliance with this section of the Act arose because Qwest, before its merger with U S WEST, provided interLATA service within the U S WEST region. Thus, if both entities were to operate as they did pre-merger, as this Commission acknowledges, consummation of the merger could not have taken place without a corresponding violation of section 271. To remedy this problem, the Commission directed Qwest to divest itself of interLATA services originating in the U S WEST region.

Consequently, the *March Merger Order* required that, prior to consummation of the merger, Qwest was to submit a "full report"⁴ on the details of the proposed divestiture for public notice and comment and final Commission approval. Qwest filed its divestiture report on April 14, 2000. On June 26, 2000, after satisfying itself that the requirements of section 271 were met,⁵ the Commission released its *June Merger Order* approving the Merger.

Section 271 compliance was paramount in the Commission's analysis and ultimate grant of the Qwest merger. The Commission therefore established safeguards to verify compliance and required a senior Qwest executive to file an annual certification of compliance with section 271 and both Merger Orders. Additionally, Qwest was to retain an independent auditor to certify annually the company's ongoing compliance with section 271. As the *June Merger Order* points out, "[o]n-going compliance by the merged company with section 271 is critically important.... These certification and auditing provisions will greatly increase the likelihood that possible future violations of section 271 will be brought to our attention."⁶

The annual certifications and an examination engagement were recently filed on April 16, 2001.⁷ Each revealed violations of the Merger Orders and section 271 of the Act. Given the importance of section 271 compliance generally, and that it was central to the Commission's approval of the Merger, these violations should not be taken lightly. The instances of noncompliance are described more fully below.

³ 47 U.S.C. § 271.

⁴ *March Merger Order* at ¶ 3 ("We require that prior to closing the merger, the Applicants must submit a full report identifying the buyer of the divested businesses; details on any and all activities provided by the merged entity on behalf of the buyer; the term sheets; and the contract of sale, including any agreements related to the support services.")

⁵ See *June Merger Order* at ¶ 5 ("Based on the record in this proceeding, we conclude that the proposed divestiture will allow the merger to proceed in compliance with the requirements of section 271.").

⁶ *Id.* at ¶ 42.

⁷ See Letter from Peter A. Rohrbach, Partner, Hogan & Hartson (Counsel for Qwest Communications International, Inc.), to Magalie Roman Salas, Secretary, FCC (April 16, 2001) ("*Rohrbach Letter*"); see also Declaration of Augustine M. Cruciotti, Executive Vice President of Qwest Communications International, Inc. (April 16, 2001); *Qwest Communications International Inc., Statement of Management Assertions*, Augustine M. Cruciotti, Executive Vice President of Qwest Communications International, Inc. (April 16, 2001); *Report of Independent Public Accountants*, Arthur Andersen ("*Report of Independent Public Accountants*") (April 16, 2001).

The audit revealed that account records of 458 customers included a prohibited in-region interLATA service component code.⁸ Qwest explains that this violation occurred because these orders “fell between the cracks,” that the incorrect code did not appear to materially affect 192 of the 458 customers and that the invoices properly identified that Touch America was the carrier.

However, the other 266 customers (the customers receiving private-line services out of the pool of 458) “were billed and branded as Qwest services.”⁹ The audit report continued: “The total amount of revenues billed as Qwest service related to these 266 customers during the six-month period ... was \$1,189,685. We also noted that an additional \$1,023,045 of revenues related to these customers was billed as Qwest service....”¹⁰ Curiously, despite revenue in excess of two million dollars, the accountants concluded that these “certain variances ... did not impact [the auditor’s] opinion on management’s assertion as a whole....”¹¹

The Commission has determined that a BOC that brands and bills long distance service as its own service – before satisfying the 271 checklist and gaining section 271 approval – is in violation of the statute: “[b]y holding themselves out to consumers as being able to provide long distance service, under their exclusive brand name, the BOCs are competing in the in-region, interLATA marketplace before they are authorized to enter this market.”¹² In addition to violating section 271, Qwest has also violated the *June Merger Order* which expressly requires that “Qwest will perform a very limited set of support services (with the retail service always branded as Touch America) for a limited group of in-region customers.”¹³

Additionally, the auditors were unable to gain access to materials needed to perform the audit: “As part of our procedures we requested selected contracts to review for consistency with the requirements related to joint volume discounts. As of the date of this report, all contracts requested for our review are not yet available and consequently, we were unable to complete our procedures with respect to this requirement.”¹⁴ Qwest’s conduct in this case further demonstrates its blatant disregard of the *March Merger Order*. The Order clearly states that “[t]he independent auditor shall have full access to business operations and records of both buyer and merged entity.”¹⁵ The auditors were obviously denied full access to records given that contracts requested were “not yet available,” even as of the date of the report.

⁸ *Report of Independent Public Accountants*, Attachment I.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *In the Matter of AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 21438 (rel. Oct. 7, 1998) at ¶ 45.

¹³ *June Merger Order* at ¶ 14 (emphasis added).

¹⁴ *Report of Independent Public Accountants* at 2.

¹⁵ *March Merger Order* at ¶ 27 (emphasis added).

Qwest has a history of violating section 271¹⁶ and does not appear to be taking its statutory obligations very seriously. Qwest should therefore not be treated as a first time offender as the FCC considers sanctions in this instance. To that end, the Commission should impose immediate sanctions for any violations of section 271 and the Merger Orders and initiate a full investigation to ascertain all instances of noncompliance with the Merger Order requirements and underlying requirements of the Act.

Sincerely,


Lisa B. Smith
WorldCom, Inc.

cc: Brad Berry, FCC
Carol Matthey, FCC
Radhika Karmarkar, FCC
Tony Dale, FCC
Peter A. Rohrbach, Counsel for Qwest Communications International Inc.

¹⁶ See, e.g., *In the Matter of AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 21438 (rel Oct. 7, 1998) at ¶ 64 (“[W]e find that Ameritech’s and U S WEST’s offering of Qwest’s long distance service as part of a combined package of services ... is a violation of section 271 of the Communications Act of 1934, as amended.”), *aff’d sub nom. U S West Communication, Inc. v. FCC*, 177 F.3d 1057 (D.C.Cir. 1999), *cert. Denied*, 528 U.S. 1188 (2000).